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Speaking and Listening to Acts of Political Dissent

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1. Introduction: Two Views of Political Speech

When a person voices dissent, she performs a particular sort of speech act. In this paper, we analyze a specific sort of dissent: *political* dissent. These speech acts belong to the class of acts that comprise political speech more generally. We will say more about what makes a speech act political as we proceed, but as a first pass, consider those communicative acts that are performed in a public context for the purpose of influencing how we live together in civic society.¹ Paradigmatic examples include leading a rally, testifying before an oversight committee, voting, petitioning, suing the government, and protesting. These are paradigms of political speech, in part, because they are acts that are commonly performed with the self-conscious goal of influencing how we live together in civic society.² There are at least two distinct ways to understand the role of these speech acts in a basically just democracy,³ which we will distinguish by the labels *liberal* and *Rousseauian*.⁴

First, the liberal understanding: because a just society is one that strives to peacefully secure and fairly distribute the advantages of mutual cooperation while protecting the rights of each individual, a common approach amongst those influenced by, *inter alia*, Hobbes, Locke, and Rawls, is to conceive of citizens as autonomous and equal participants in political compromise about how to live together. Citizens, according to this approach, have a strong but defeasible obligation to follow the laws of their society, at least when the laws are basically just. Hobbes argues that this obligation derives from one's self-interest; Locke argues that it derives from natural law; in an early paper, Rawls rather boldly "...assume[s], as requiring no argument, that in a society such as ours, [there is] a moral obligation to obey the law."⁵ We are not

¹ In his contribution to this volume, Michael Lynch defines political speech as speech aimed at influencing policy. We suspect that this is simply a different way of characterizing speech that is aimed at influencing how we live together in civic society. By focusing on policy, Lynch draws attention to the general rules and norms that organize civil society; we think that any speech that aims to influence collective living will have implications for general policies.

² A speech act can be political, however, even when it is done primarily for other reasons. A newspaper, for instance, might publish stories primarily because they are of interest to its readership and will sell copies, not explicitly because it wants to influence how we live together in civil society. Nevertheless, many editorial decisions, it seems to us, count as political speech of a more subtle sort.

³ By 'basically just democracy', we mean, roughly, a society with a relatively stable rule of law and equality opportunity for all citizens to vote for legislation and/or representatives in free and fair elections. We don't mean a society that is *mostly* just, as we take it that even basically just democracies can harbor serious and systemic injustices.

⁴ This distinction is inspired by Daniel Markovits's "Democratic Disobedience" (*Yale Law Journal* 114 (2005), 1897-1952). Markovits uses the term 'republican' to label what we are calling the Rousseauian view. In contemporary political philosophy, 'republican' may call to mind Philip Pettit's account of non-domination, which is not obviously Markovits's or our topic. We hope that calling the view "Rousseauian" will prevent any confusion with Pettit's view. Also, we do not claim that these are the only two ways of understanding political speech in a basically just democracy, but they are the two that will interest us here.

⁵ See, respectively, Hobbes, *Leviathan*, chs. 13-18, Locke, *Second Treatise of Government*, chs. 1-13, and Rawls, "Legal Obligation and the Duty of Fair Play," in S. Hook (ed.), *Law and Philosophy* (NYU Press), pp. 3-18 (the

concerned here with the source of the obligation; rather, we want only to note that within the liberal tradition such an obligation is typically taken to exist. The obligation can hold even if those citizens disagree with a particular law or view it as unjust. Roughly speaking, this is because the body of law in force in a society is seen as the result of a basically fair procedure for compromising between the competing interests of the citizenry, and such compromises are necessary for all (or at least most) citizens to enjoy the vast benefits of social cooperation compared to any alternative that lacks the rule of law.

Proponents of this liberal approach would not, however, regard the laws of society as infeasible or beyond reproach. One of the core purposes of political society is continued discussion, debate, refinement, and enhancement of the laws, which represent the compromise currently in force for living together in society. Given this, political speech might be conceived of as the means by which freestanding citizens participate in a continual negotiation about which general norms will govern all participants in the collective so that the benefits of cooperation get divided fairly, given the private interests of individuals. It's not only that such negotiation aims to improve the compromise in force, moving closer and closer to some ideal. The terms of any previous compromise will need to be updated as the material and technological situation of the society evolves and the citizenry's diverse interests change. Political speech, according to the liberal, is the principal means by which this improving and updating of the social contract transpires. The point of such speech from the liberal perspective is for individuals in the group to have a forum to express their beliefs, desires, preferences, and goals as a way of getting their voice heard. A right to free speech is a right to voice one's position in collective negotiation.⁶

The Rousseauian will demur at the liberal's account of the way individuals are thought to stand to the collective in a polity.⁷ According to this approach, citizens are not "freestanding," for the notion of being an autonomous participant in social negotiations about how to live together is dependent on, and not prior to, the notion of a political community. Versions of this thought are expressed by Rousseau, Hegel, and Habermas; they seem to be at least part of what Aristotle has in mind when he asserts that the *polis* is prior to the individual.⁸ These philosophers emphasize the ways in which citizens' interests are inexorably wrapped up with their place in society. Because of this, Rousseauians do not present political speech as the means by which freestanding citizens with diverse private interests engage in collective decision making. Good collective decision making is not, on this view, a matter of everyone pursuing their own private interests within certain constraints.

quote is from p. 3). To be sure, Hobbes also thinks there are laws of nature, and self-interest underwrites Locke's conception of natural law, but their emphases are sufficiently different to warrant the characterizations above.

⁶ We use 'right' here as non-committally as is possible; we take no stand on the metaphysics of rights. For worries about such non-committal usage of the term, see Onora O'Neill, "The Dark Side of Human Rights," *International Affairs* 81:2, 427-39.

⁷ As is common when one draws on an historical figure as the basis for a view, we do not claim here to be representing Rousseau's precise view, nor do we claim that ours is the only plausible interpretation of his view. We are, however, partial to the reading of Rousseau that Joshua Cohen offers in *Rousseau: A Free Community of Equals* (New York, Oxford University Press, 2010). When we do draw on the historical Rousseau, we do so from Victor Gourevitch's translation of *The Social Contract* (in *The Social Contract and Other Later Political Writings*, New York, Cambridge University Press, 1997, 39-152).

⁸ Aristotle makes this remark at *Politics* I.2.1253a19 and I.2.1253a26. For Hegel's view, see *Elements of the Philosophy of Right*, Allen W. Wood, ed., H. B. Nisbet, trans. (Cambridge: Cambridge University Press, 1820/1991); for Habermas's, see *The Theory of Communicative Action, vol. I: Reason and the Rationalization of Society*, T. McCarthy (trans.). (Boston, Beacon, 1981/1984).

According to the Rousseauian view, we achieve our autonomy not by being protected from and by the majority in our pursuit of our own private interests but by participating in civil society. Ideally this gives us what Rousseau calls “civil freedom,” a kind of freedom that is impossible outside of civil society.⁹ This is the freedom, Rousseau claims, of self-mastery, freedom from base impulse, “for impulse of mere appetite is slavery, and obedience to the law one has prescribed to oneself is freedom.”¹⁰ This self that prescribes this law is the collective self, the polity to which one belongs as a part. In this Rousseauian framework, public speech isn’t so much staking out one’s own private (freestanding) negotiating position but rather something more like playing one’s role in brainstorming a solution to a collective action problem from the perspective of the lawmaking, freedom-constructing collective.

When a people gives itself laws to structure its collective activity, it has given itself, in Rousseau’s idiom, a *general will*. This will coordinates and structures the activity of a collective much as a play-call coordinates and structures the activity of a basketball team acting as a unified whole. When a person participates in the formation of a general will, she thinks about what rule or goal or course of action will benefit the collective, considered as such, rather than think about what would benefit her, considered as an individual. If a people gives itself a general will, individuals belonging to the collective who act on that will do so in a self-interested way, but they do so out of collective self-interest, not individual self-interest. Again, to act on the general will is to exercise one’s agency, to overcome the shackles of one’s individual inclinations to exercise one’s civil freedom.¹¹

In this theoretical context, in contrast with the liberal view, citizens have an obligation to obey the law in order to be free, insofar as obeying the law is partly constitutive of having civil freedom and exercising autonomy. Still, of course, we shouldn’t think of the laws of any society as indefeasible or beyond reproach. Freedom comes in degrees, and—for the Rousseauian—one of the core purposes of political society remains continued discussion, debate, refinement, and enhancement of the laws and so the autonomy of members of the collective. On this alternative view, however, the law represents more than the compromise that happens to be currently in force for living together in society so that each of us privately shares in the benefits of mutual cooperation. Instead, the law represents the collective will of the society, a will which can and often is changed. Given this, it becomes more natural to view political speech as the principal means by which the collective will is expressed and changed. Rather than seeking a negotiated solution in light of competing private interests, this alternative view treats political speech as part of continual collective deliberation amongst mutually dependent citizens about which norms will govern its collective actions. As Meiklejohn sums up the view of political speech according to this perspective: “The point of ultimate interest is not the words of the speakers, but the mind of the hearers.”¹² On this view, any right citizens have to engage in political speech is grounded in the interest of the hearers; it is not, in Meiklejohn’s words, a right to “unregulated talkativeness.”¹³

⁹ *Social Contract*, I.8.2.

¹⁰ *Social Contract*, I.8.3.

¹¹ For more on the idea of the general will and its application to contemporary political issues, see Graham Hubbs, “Transparency, Corruption, and Democratic Institutions,” *Les ateliers de l’éthique / The Ethics Forum* 9:1 (2014): 65-83.

¹² Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York, Harper Brothers Publishers, 1948), p. 28.

¹³ Meiklejohn, *Free Speech and its Relation to Self-Government*, p. 28.

This essay will explore some of the ways these views differ on the norms that govern politically justifiable dissent in a basically just democracy. In speaking of an act of dissent being “politically justified,” we mean to abstract away from the moral quality of the content of what dissenting speakers say. A major reason to want to understand dissent in a political context is to figure out what we as a collective should do when we as individuals have deep moral disagreements with each other about matters that influence how we live together. Even in contexts with deep moral disagreement, we can seek an overlapping consensus that forms a conceptual space within which robust moral issues can be bracketed in order to query matters of common concern, including the justifiability of acts of dissent. Our notion of political justifiability belongs to this space. We will investigate how the liberal and Rousseauian views differ on the political justifiability of acts of voicing dissent, and we will also look at their explanations of when and why acts of dissent give an audience reason to listen to and take seriously what the dissenters are saying. Although we think there is much to learn from the liberal and the Rousseauian on these matters, we argue that the conceptual resources on which each view relies to explain when we should listen to protest are, in a sense we shall clarify, insufficiently morally neutral. Pointing out this common shortcoming will pave the way for what we want to contribute to the discussion, viz., a speech-act analysis of dissent. The tools of speech-act theory, we hope, will further enrich our understanding of the norms surrounding political acts of voicing dissent.

2. Topic: Voicing Dissent

There are various circumstances in which one might find oneself disagreeing with one’s government about some issue. When one expresses this disagreement, one voices dissent against one’s government. By “voicing dissent” we have in mind the multifarious ways one might give voice to this disagreement through political speech. Examples include voting against the government, campaigning for the opposition, challenging a sitting politician, marching in protest, breaking laws in civil disobedience, and whistleblowing within the government.

These examples are not uniform. Some are more extreme than others. Some are more constructive than others. Some open one up to legal prosecution more than others. Within each example, we can also imagine a plethora of different instances of its particular form of voicing dissent. Voting against the government in a situation where one also disagrees with the main opposition has a different character from voting for an opposition in which one truly believes. Marching with a few fanatics in support of a niche issue feels different from coordinated marching with millions across the country. Some ways of whistleblowing responsibly protect government agents whose lives would otherwise be in danger; other whistleblowing exposes everything to the Internet.

Any basically fair democracy, we claim, needs to have certain institutionalized channels for competing viewpoints to be voiced and discussed regularly. These include regular elections, a press that is free to criticize the government, and civic fora that are explicitly constituted for the purpose of publicly voicing views intended to influence policy. For any speech act performed in one of these institutions, it will be easy enough to say whether the act is justified—if the rules are followed, the act is justified. To be a bit more precise, we should say that such an act would be *institutionally* justified. The act might have been morally unjustifiable, or prudentially unjustifiable, but as long as the rules were followed, the act will be institutionally

justified for playing by the rules. Maybe these sorts of institutions are all that would be needed for voicing dissent in an ideal democracy. However, real world politics illustrates how most existing democracies have alternative, less institutionalized channels where competing viewpoints are voiced. Civil rights campaigners boycott busses, students occupy administrative buildings at their university, famous football players refuse to pledge allegiance to their nation's flag, much-followed tweeters go on rants, etc. At the limit, acts of civil disobedience, where one breaks the law in protest of some law or governmental policy, are either a minimally or completely non-institutionalized acts of dissent.¹⁴ Such acts, nevertheless, may be politically justifiable even though they cannot be institutionally justified; sometimes illegal dissent deserves to be heard.

Although we think that acts of dissent come in varying degrees, we will focus, for ease of presentation, just on acts that are legally performed through institutionalized channels and acts of civil disobedience. The next two sections will treat each of these sorts of acts in turn. In each section, we will, as indicated in the introduction, explore two normative issues surrounding these act-types. The first issue concerns how acts of dissent may be politically justified. As we shall see, the liberal view and the Rousseauian view offer competing accounts of what justifies acts of dissent. The second issue concerns when and why an act of dissent gives its audience reason to listen to and take seriously what the dissenters are saying. Here, the liberal and the Rousseauian differ when it comes to listening to institutionalized dissent, but they share a general account of when and why civil disobedience should be listened to. We will eventually argue that shortcomings of both views should lead us to seek an alternative, but let us learn from them first before criticizing them.

3. Legal Dissent

To home in on the normative issues at hand, consider the following pair of cases. Imagine a group of students from the Black Lives Matter movement who have assembled to voice dissent against the names of certain buildings on campus. The buildings in question are named after former slaveholders, and the students have been granted permission by university administration to conduct their protest. Compare this case to one in which a group of Alt-Right students are granted permission to protest affirmative-action admissions policies. On many moral views (e.g., those that include a robust conception of historic justice), one of these groups is voicing dissent against something worth protesting, and the other is voicing dissent against something worth preserving. Even if only one of these positions is justifiable, it nevertheless may be true that both acts of dissent are justifiable. As the examples have been presented, these acts of voicing dissent are institutionally justified, because they have been permitted by the relevant authorities. Still, even in this institutionally justified context, questions remain: first and foremost, *should* a public institution, such as a public university, permit either or both of these dissenting speech acts?

¹⁴ It won't matter for our purposes whether civil disobedience is understood as non-institutionalized, because it involves law-breaking, or whether it is understood as minimally institutionalized, because at least some cases are recognized as democratically justifiable means of pursuing political objectives. Also, we understand civil disobedience as anti-revolutionary, in the following sense: whereas revolution aims at the total replacement of existing governmental institutions, civil disobedience seeks to reform certain institutions while preserving most of a government's core institutions. We suspect that the distinction between revolution and civil disobedience is a matter of degree, not kind. We don't think our arguments turn on any specific view of civil disobedience, so these rough remarks should suffice for our purposes.

The liberal view of political speech gestured at above would understand the Black Lives Matter and Alt-Right protests as an attempts to express positions as part of the ongoing negotiation about the norms by which we live together in civic society. Liberals would argue that we should respect the speakers' autonomy (as a liberal will understand it) and so their right to their own opinion; moreover, they would argue that we should respect the speakers' right to voice that opinion in a public forum with the intention of influencing policymaking. In general, the liberal views civil rights as protections of the private interests of individuals, especially for cases where these interests are challenged by what's expedient for the collective. So liberals believe in a general right to free speech, one which protects the ability to advocate for any view about how we should live in society together, no matter how discriminatory or even anti-liberal the view might be. They do so precisely because they see political speech as the arena in which competing viewpoints about how we should live together can be negotiated so that the resulting view counts as a fair compromise.

By contrast, the Rousseauian view of political dissent gestured at above would understand the Black Lives Matter and Alt-Right protests as attempts to express and to form the general will. According to the Rousseauian, these groups have a right to voice their dissent publicly if—but only if—the opinions and arguments they express are not already on the table and might plausibly become a part of the general will. If the opinions and arguments are already on the table, then for the sake of forming the general will, there is no need to let, e.g., a Black Lives Matter or Alt-Right protest repeat the case for its side. Knowing whether a speech act is completely repetitive, however, or whether it is contributing something novel to the conversation is rarely straightforward. We often are not in a position to know whether every relevant argument for a view has been put forward, so there will be a general presumption on the Rousseauian view to allow speakers to engage in political speech, even if the topic under discussion has been broadly considered.

There are other reasons, however, that on Rousseauian grounds the Alt-Right protesters might not have the right to speak. For example, the Rousseauian might exclude old views that history has already rejected—e.g., slavery or Nazism. We can think of history as the process of collective deliberation and settling on these matters. That doesn't mean that historically settled topics can't be reopened, but following the principle of *stare decisis*, there is a general presumption against reconsidering views that are already settled. Also, certain views might be so beyond the pale as not to merit serious consideration. If the Alt-Right supporter wants to advocate that everyone opposed to his view give him all of their money and then willfully jump off of a cliff, the Rousseauian can say that he has no right to advocate for this view, as it is one that whose potential to become part of the general will is totally implausible.

The liberal thus cleaves tighter than does the Rousseauian to a right to free speech, which should be protected from government intervention.¹⁵ These differences between the liberal and Rousseauian approaches can show up in which rules come to govern specific institutions. For example, in the United States, the Supreme Court has made a number of decisions that interpret the law in a liberal vein. For example, in *Brandenburg v. Ohio*, the Court ruled that unless a speech act could be shown to lead to "imminent lawless action," the speaker has a right to express their view. The case concerned a Ku Klux Klan rally which dissented to the "suppression" of the Caucasian race and called for a march on Washington. The Court ruled

¹⁵ The liberal view is thus compatible with the "more speech" doctrine popularized by Justice Brandeis in *Whitney v. California*. For a critique of this doctrine, see Mary Kate McGowan's contribution to this volume.

that the rally was permissible as a just exercise of free speech, thereby clarifying the scope of the First Amendment. Had the Court reasoned on more Rousseauian lines, it might have interpreted the case differently. The Rousseauian might note the historical influence of white racism in fracturing the general will, pointing out that white racism for centuries resulted in laws for the collective will of white males, not of the polity as a whole. She might go on to paraphrase Dr. King, saying that the arc of history bends towards justice, and racist speech no longer has any place in forming or maintaining the general will—the matter is settled, and the topic is off the table. No listener values from hearing such speech, so, *pace* the Supreme Court’s ruling on the case, no one has the right to express such racist views. An institution embodying this line of thought would differ from the institution of free speech as it presently exists in the U.S.

The difference between liberal and Rousseauian here also shows up in their respective views of when and why an audience has a reason to listen to and consider dissent.¹⁶ For the liberal, the right to speak entails no corresponding right to be heard. Indeed, just the opposite: a given member of the audience has the right to consider or to ignore the speaker’s dissent as that member chooses. An audience member has a reason to listen to dissent, according to the liberal, just in case doing so either is or appears relevant to the individual interests of that member. By contrast, the Rousseauian claims that an audience member has a reason to listen to any dissent that is relevant to the project of collective decision making, even if the topic of dissent is not relevant to that member’s individual interests. The Rousseauian, again, countenances a right to speak only when this is plausibly viewed as an attempted expression of the general will. When it is, there is a corresponding right to be heard by the general public. For the Rousseauian, the value of speech rests in the minds of the hearer, not the mind of the speaker, so if a given speech act is politically valuable, it has a right to be heard. Because the speaker of such an act has a right to be heard, the members of the speaker’s community have a reason to listen to this act of voicing dissent.

4. Civil Disobedience

Although these views differ on when and why to listen to acts of legal dissent in an institutionalized context, they agree, at a general level, on when and why to listen to acts of civil disobedience. To see why, let us start by slightly modifying the cases from the previous section. As in the previous section, let one case concern Black Lives Matter students who dissent to the names of certain campus buildings, and let the other concern Alt-Right students who dissent to affirmative action admissions policies. In both cases, however, let the act of dissent not be a permitted rally but rather the illegal occupation of the university president’s office. What could justify either of these illegal acts of dissent?

The liberal and Rousseauian agree that such acts can be justified, and that when they are, the justification is exculpatory, in that the justification exculpates citizens for violating their default obligation to follow the law. Consider the liberal view. Although liberals hold that one has a default right to free speech, this default ends with illegality. Nevertheless, liberals generally think some civil disobedience is justified as a form of dissent. However, they’re going to say that it shouldn’t be promoted, and its protection should only occur as an exception to the law (e.g., through pardon or judicial discretion of sentencing) in light of its overall promotion of

¹⁶ We aim here to take no substantive view on the nature of reasons. For a review of the various views one might take, see Bryan Weaver and Kevin Scharp, *Reasons and Semantics* (Oxford UP: forthcoming).

liberal ideals (especially rights). The basic idea is that civil disobedience could be justified when going to the extreme of breaking the law is justified by how bad the object of one's dissent is. More precisely, liberals will say that civil disobedience is justified when it is done in the face of a gross violation of civil rights (or something of comparable liberal value), when one cannot reasonably expect this to be corrected through more institutionalized political processes, and when this dissent will tend to strengthen rather than undermine the overall rule of law in the society.¹⁷

On the Rousseauian view, by contrast, illegal acts of political dissent are justified if breaking the law reasonably appears the only way for some neglected possible component of the general will to be considered. More precisely, the Rousseauian claims that civil disobedience is justified when there is a "democratic deficit," i.e., a procedural shortcoming in the formation of the general will.¹⁸ There are many ways that normal democratic processes can give rise to these deficits, including strategic compromises between large factions, the marginalization of issues in the name of procedural efficiency, special interest manipulation of normal deliberative processes, or the "inertia" of matters that have been decided as law. So, to determine whether the act of civil disobedience is justified, Rousseauians will ask whether the dissenter's voice, or even simply the message that she would have delivered, is being or has been illegitimately ignored in "brainstorming" about how to live together in civil society. This could happen through overt silencing, but there are other subtler democratic deficits (e.g., campaign laws that prevent some candidates from getting on the ballot, voting systems that corner a perpetual minority, corporate control of media). These deficits provide plausible grounds for some paradigm examples of civil disobedience (e.g., the anti-global WTO protests).

The views differ, then, on what grounds the justification of illegal acts of voicing dissent. They agree, however, on the following: whenever a speaker is justified in illegally voicing dissent, the members of the speaker's community have a reason to listen to what the dissenter is saying. On the liberal view, if a rights violation is severe enough to justify civil disobedience, then that fact gives members of the relevant community a reason to listen to those who protest about the rights violation. Similarly, on the Rousseauian view, if a democratic deficit is gross enough to justify civil disobedience, then that fact gives the members of the relevant community a reason to listen to the content of that dissent. In spite of their differences regarding the underlying justification of civil disobedience, both views treat civil disobedience as exceptional and thus in need of a special justification. If that justification can be provided, that fact gives the audiences of these illegal acts of voicing dissent a reason to listen to and consider what the dissenter is saying.

We think that studying the liberal and Rousseauian approaches to voicing dissent provides valuable insights into the normative issues surrounding both institutionalized dissent and civil disobedience. These views falter, however, by relying on substantive normative views to explain when audiences have a reason to listen to and consider what dissenters are saying. To

¹⁷ The *locus classicus* for this view of civil disobedience is Johan Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), pp. 319-343. Other liberal views include Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1999), pp. 104-16, and David Lefkowitz, "On a Moral Right to Civil Disobedience," *Ethics* 117 (2007), 202-33. Kimberlee Brownlee's account in *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012) also belongs to this tradition; see esp. chs. 1-4. Brownlee advises that we understand justifications for civil disobedience as the sort of thing a defense attorney might give; on this, see chapters 5-6 of *Conscience and Conviction*.

¹⁸ The source of this idea is Markovitz; see his "Democratic Disobedience." William Smith argues for a deliberative democratic view of civil disobedience that has anti-liberal affinities with Markovitz's position; see his "Civil Disobedience and the Public Sphere," *The Journal of Political Philosophy* 19 (2011), 145-66.

see how the liberal view falters, consider again the activities of the Black Lives Matter protesters who occupy the university president's office. A sympathizer might argue that we should listen to illegally voiced dissent in this case because these protestors are reacting to the gross historical injustice of slavery and that, moreover, they would be reasonable to expect that this will not be corrected through more institutionalized political processes and that this action would tend to strengthen rather than to undermine the overall rule of law. But is that right? We suspect that those on the other side of the debate would say that the names of university buildings are no matter of consequence and that the protesters should just get over it and quit complaining about slavery. With no agreement about whether there is a serious rights violation, there can be no agreement about whether the audience has a reason to listen to the dissenters.

A similar disagreement is predictable between the Alt-Right dissenters and those who disagree with them. The Alt-Right dissenters claim that the rights of whites to equal opportunity are violated by affirmative action policies; their opponents respond that this is a misunderstanding of equal opportunity, and even if there are such rights violations, these are far outweighed by the historical injustice of slavery, including its long-term consequences. So, should the audience listen to and consider what these dissenters are saying? We think the liberal account is going to have a hard time adjudicating on these issues without deploying a theory of rights that already has the answer "baked in." A liberal justification of one or the other examples of illegal dissent won't have any prospect of convincing someone on the other side of the debate that the act is politically justifiable and so should be listened to. If the disagreements are ultimately about whether there has been a gross violation of rights, appealing to rights in the justification if illegal dissent is likely to be question-begging or bump-in-the-rug displacing.

The Rousseauian is no better off than the liberal on this score, for those who disagree about whether a policy merits illegal dissent will also tend to disagree about whether there has been a democratic deficit. Returning to the examples: a Rousseauian sympathizer might argue that these protestors should be listened to because they are giving voice to marginalized points of view in our collective brainstorming about how to live together. In either case, the Rousseauian justification would go, the act of civil disobedience is worth listening to because it expresses something important to the formation and maintenance of the general will. But a critic in each case may simply deny that there is any "democratic deficit" in the sense relevant to justifying dissent. Against the Black Lives Matter protesters, an opponent might say that the names of buildings are too trivial a matter to the general will to justify breaking the law; against the Alt-Right protesters, an opponent might say that white people already have a strong, well-heard voice, so their claim that their voice hasn't been heard is unjustifiable. A Rousseauian justification of one or the other examples of illegal dissent won't have any prospect of convincing an opponent that the act is politically justifiable and thus one that should be listened to and taken seriously by the relevant audience. If the disagreements are ultimately about whether there is a democratic deficit, then, in a manner that parallels the problem on the liberal view of appealing to rights, appealing to democratic deficits to justify an act of illegal dissent is likely to be question-begging or bump-in-the-rug displacing.

The common problem here, we think, is that both views about political speech are committed to relaxing the abstraction from content too soon to provide a satisfying analysis of dissent in a context of robust moral disagreement. If a theory of political speech is going to make sense of when there is reason to listen to dissenters and consider what they are saying in the context of such disagreement, then it is going to have to carve out a space where those who disagree can still recognize and respect each other's rights to voice their views and have them taken seriously by the relevant audience as part of our collective decision making. The liberal and

Rousseauian accounts fail to carve out this space, for each attempts to settle justificatory issues by appealing to its preferred robust moral view (about rights or democratic deficits). In many cases of disagreement, this collapses the space where those who disagree about the relevant robust moral issues can still recognize and respect each other's rights to voice their views. To preserve this space, a theory of dissent needs to articulate some normative constraint on political speech that does not turn on robust moral views too soon in the chain of justification.

We say "too soon" above because ultimately the ideas that people have rights and that collective decisions should be made democratically are moral views, as are the ideas that people deserve respect and that peaceful discussion of differences is preferable to violent exercises of power. Weak moral assumptions like these are going to be in the background of any justification of dissent in the context of political philosophy, and so every view about the justifiability of various forms of dissent is going to be ultimately grounded in morality. However, by making the question of justifiability of illegal dissent turn on who has which rights, a liberal justification will tend to lose many who would agree with these weak moral assumptions but still disagree about who has the relevant rights. Similarly, by making the question of justifiability of illegal dissent turn on what counts as a democratic deficit, a Rousseauian justification will tend to lose many who would agree with these weak moral assumptions but still disagree about when there has been a democratic deficit. This is why we think the liberal and Rousseauian views about political speech fail to provide theoretical tools that are neutral enough to make sense of the political justification of dissent in the face of robust moral disagreement. None of this means that the liberal and Rousseauian views don't illuminate particular cases of voicing dissent: we just want some more neutral tools for articulating a general normative constraint on political speech that does not turn on robust moral views too soon in the chain of justification.

5. The Speech-Act View

We think speech-act theory can supply these tools. To apply speech-act theory to an analysis of voicing dissent, note first that all verbal acts of dissent have an evaluative element and that most have a corresponding prescriptive element. All verbal acts of dissent evaluate something as bad or wrong in some way, and most correspondingly demand change to rectify the badness or wrongness in question.¹⁹ Focus here on the standard case, in which disapproval is expressed and some corresponding change is demanded. For any such speech act, we want to suggest that sincerity in disapproval and good faith in making the demand are two of its *felicity conditions*. This means that one engaging in dissenting political speech should sincerely disapprove of that of which they dissent, and the way they demand change should reflect a good faith commitment to the norms on which these changes are based. (These are not the only felicity conditions we acknowledge—more on this below.) That is to say, the norms "be sincere" and "demand in good faith" are partly constitutive of political dissent being the sort of speech act that it is. In something approaching a slogan, if you're going to say contrarian things in the context of negotiating the social contract, then you should genuinely disapprove of what you're against and be willing to try to live up the alternative norms you are for.

¹⁹ Note, then, that some acts of direct action will fall outside of the scope of our analysis. Consider an animal rights activist who breaks into a psychology laboratory and liberates the lab mice. This activist is not demanding change; he is enacting change directly. His act is not primarily communicative; indeed, if he leaves no trace behind, the public may be left to guess at his motive, in which case his act has no obvious assertive element. We have no gripe with anyone who wants to characterize direct action as dissent, but we will presently bracket the phenomenon.

To repeat, we're *not* claiming that a speech act counts as political dissent just in case it is sincere and done in good faith. Rather, we're claiming that these standards provide constitutive norms for the speech act of political dissent; if these norms are flouted, the result is, in Austin's terminology, an abuse.²⁰ To get clearer on the way in which these norms can be thought of as felicity conditions, let us consider, for the sake of comparison, what it means to say that truth is a constitutive norm of assertion that partially determines its felicity conditions. An assertion can be bad—that is, infelicitous—if it is difficult to understand as seriously aiming at the truth. If, for example, a speaker asserts “I am a pumpkin,” the speech act is bad not only because it is false, but also because it is hard to take seriously as even aiming at the truth. Speech acts of dissent can go similarly bad, we claim, if they are carried out in ways that indicate either insincerity or bad faith. Suppose, for example, that someone in a town hall meeting proposes to enforce rules on how long one may speak at the meeting, arguing that a standing but usually ignored one-minute-per-speech-rule should be enforced, as meetings are taking too long. If it turns out the dissenter dissents not because she really disapproves of longer slots for each speaker but because someone else paid her to say this, we'd think her insincere. Moreover, that'd make her dissenting speech act bad *qua* political speech in an important way: it would at least partially undermine audience's reason for listening to the speaker.²¹ Similarly, if she were to demand that the rules be enforced by giving a ten-minute speech, it would become difficult to take her to be seriously engaged in good faith political discussion, as she is actively violating the change in policy she purports to be demanding. Unless she is so absent-minded that she completely loses track of time, she will seem hypocritical. On our analysis, this makes the person's speech a bad *qua* act of voicing dissent, not because of the particular policy that is being advocated for, nor just because the dissent is unlikely to affect change. It is a bad speech act because it is conducted in a way that is self-undermining and so is infelicitous.

So far, this speech-act analysis of dissent may seem fairly anemic. Sure, political dissent should—because of the sort of speech act it is—be sincere and in good faith. But that is arguably true of most evaluative and prescriptive speech performed in a cooperative context. What does this have to do with the political justifiability of dissent and when audiences have political reason to listen to what dissenters are saying?

We think it is already interesting to notice that indications of insincerity and bad faith would serve to undermine dissenters' claim to any right to be listened to by their audience. That provides a kind of positive guidance to would-be dissenters: if you want your dissent to be heard and taken seriously by your political community, aim to dissent in such a way that avoids any suspicion of insincerity or bad faith. However, we also think there is a third constitutive norm on the speech act of political dissent that brings us closer to the distinctively political realm. We also want to suggest that acts of political dissent should be based (at least implicitly, but recognizably) on considerations of justice.

²⁰ There is another kind of speech-act norm we won't discuss here. The relevant norms do not determine good and bad instances of their corresponding acts but enable something to count as a given act in the first place. For example, to marry someone in the Catholic church, one must be a priest and the people being married must be male and female. It's not that a Catholic marriage violating these conditions is somehow bad or not as it ought to be qua Catholic marriage; rather, it's not a Catholic marriage at all. Austin labels these sorts of infelicities 'misfires' (*How to Do Things with Words* (Cambridge: Harvard UP, 1962), 16).

²¹ Explaining precisely why this reason would be undermined is a complex matter. For more on this, see Richard Moran's work on testimony, including “Getting Told and Being Believed” (*Philosophers Imprint* 5/5 (2005)) and “Testimony, Illocution and the Second Person” (*Proceedings of the Aristotelian Society* 87 (2013), 115-135).

We intend “justice” to be understood broadly and generically here: following Aristotle, we do not think of justice merely as distributive justice, but also as rectificatory, reciprocal, and political.²² If the audience of a speech act of political dissent can’t tell that the speaker is addressing, at least in part, what he thinks is and/or isn’t just, then the audience will have a hard time interpreting the speaker as engaged in political dissent. Of course, the speaker’s reasons may be based in justice even if his audience can’t see that, and of course, a speaker and his audience may disagree on whether a purported injustice is, in fact, an injustice. However, if it is not clear that justice is at issue at all, a speech act of voicing dissent will likely be seen as a sort of personal complaining—it is not likely to be comprehended as the sort of political dissent that has been our topic here. Attempts to engage in political dissent that do not recognizably engage considerations of justice will, we would expect, be infelicitous.

Having noted this third felicity condition on political speech, let us apply the speech-act view to an analysis of political dissent. The view allows for an analysis of the justifiability of dissent both in legal institutionalized contexts and for illegal civil disobedience, an analysis that does not, as the liberal and Rousseauian accounts do, bring in substantive moral views too soon. Those on opposing sides of the political spectrum may disagree whether the name of a building constitutes a substantive rights violation or whether there is a democratic deficit in marginalizing the voice of whites, but they might still agree that self-undermining speech acts of dissent fail to be good political speech. They can agree that whatever the dissenters are saying, if they are saying it in a way that comes across as insincere, in bad faith, or completely unconcerned about justice, then it will be hard for an audience to recognize as political speech worth listening to. We are not claiming here that rights and democratic deficits are irrelevant to justifying dissent. Rather, we think that one gets to appeal to those only (a) if both sides of a disagreement agree about them, or (b) if more neutral considerations attaching to the speech act as such haven’t settled the issue about the justifiability of the dissent. Many interesting real-world cases won’t be like (a), at least not in the moment. And when we get to (b), we’ve basically given up hope on convincing those with whom we disagree—and we shouldn’t do that if we’re still engaged in political speech with them (which is consistent with thinking that some people are beyond the pale).

We also think our speech-act view provides a more basic and—for that reason—more attractive view of when an audience has a reason to listen to and consider an act of dissent. If dissent is voiced in a sincere, good faith way and appeals to recognizable considerations of justice, that gives the community members to which the dissenters belong a reason to listen to and consider what the dissenters are saying. To return to our examples: if the Black Lives Matter students are sincere, protest in good faith, and base their complaints in recognizable considerations of justice, the university community has a reason to listen to them. The same holds for the Alt-Right protesters. Now, much will turn on how one fills in the details of “appealing to a recognizable conception of justice,” but we think this generic consideration allows us to catch the variety of cases in which there is reason to listen to dissent, a variety that is broader, we think, than the more specific liberal and Rousseauian views can capture.

Moreover, we think the generality of the speech-act view gives it diagnostic potential that the liberal and Rousseauian views lack. Unlike the other views, ours is equipped to explain why an act of dissent fails when it does so. Some people fail to listen to Black Lives Matter protesters because they are unconvinced that the injustices voiced in their dissent are genuine injustices. Others fail to listen to Alt-Right protesters because they hypocritically rely on the

²² Aristotle discusses these sorts of justice in *Nicomachean Ethics*, V.1-5.

government programs they decry. We are not claiming that every failure of dissent can be explained by the norms we have outlined here, but we do not think that counts against our approach—rather, it points to ways to develop it. We hypothesize that when an act of voicing dissent fails, it usually does so because some felicity condition, which can be formulated as a constitutive norm, has been flouted. For failures that cannot be explained by the norms we have presented, we predict there is some further felicity condition and further norm that, when added to the speech-act view of voicing dissent, will explain the failure. Proceeding in this way, we can enrich our understanding of the speech act of dissent.

6. Conclusion: Reflections on Silencing

Our essay has examined some of the political justifications for voicing dissent and some of the reasons one might have for listening to acts of dissent. In the last section, we drew upon the resources of speech-act theory to provide an account of the norms surrounding voicing dissent that is, we think, more basic than what the liberal or Rousseauian has to offer. We will close with some reflections on what our view has to say about acts that silence speech.²³

By ‘silencing’, we mean acts that make it very difficult, if not impossible, to hear what a speaker intends to say. The limiting cases are those in which a speaker is literally silenced, by, e.g., being knocked unconscious or by being gagged, but a speaker may be silenced even though she can still speak, perhaps even loudly. If someone who wants to hear the speaker cannot do so because of the obstructive actions of others, those others, as we intend the notion, have effectively silenced the speaker. Of interest to the present discussion are cases in which a speaker is silenced by the speech acts of others; we shall call this phenomenon *shouting down*. What, if anything, does our view have to say about silencing that is accomplished by shouting down a speaker?

Based on the arguments of the previous section, if a speaker speaks sincerely and in good faith, and if she recognizably appeals to considerations of justice, her audience has a reason to listen to her. If her audience has a reason to listen to her, then they have a reason not to silence her, and so not to shout her down. This does not mean that the audience cannot be justified in dissenting to her, but there is a difference between an audience voicing dissent and a crowd silencing with noise. If a crowd uses the amplitude of voice to shout down a speaker, it is not voicing dissent. The content of the crowd’s speech is merely incidental; the crowd may just as easily achieve its goals by blowing air horns. To defend acts of silencing by appealing to free speech, we think, is misguided, or disingenuous, or cynical, but not justifiable.

This is not to say that there cannot be other justifications for silencing speakers. The Antifa movement, for example, argues that the pernicious effects of allowing fascist speech sufficiently outweigh any considerations—including liberal and Rousseauian—to the contrary. There is thus every reason to toe the line, to give “not one inch,” as they say, to the views of fascist speakers.²⁴ Our view does not contradict the Antifa position. We claim that the Antifas have a reason to listen to fascist speech, if that speech is sincere, made in good faith, and recognizably appeals to considerations of justice, but that does not preclude that reason being

²³ Our topic here is different from the “elegant silences” discussed in Alessandra Tanesini’s contribution to this volume.

²⁴ For more on the contemporary Antifa movement, see Mark Bray, *Antifa: The Anti-Fascist Handbook* (New York, Melville House, 2017).

overruled by competing considerations. One might be the pernicious effects of such speech (although to make this argument compelling, the Antifa will need to persuade her opponent that these effects outweigh the negative effects both of silencing fascist speech and of silencing speech in general). Another might be a Rousseauian argument mentioned above, viz., that the principle of *stare decisis* should be applied to fascist views, so, having been historically redudiated, they have no place in discussions of the general will. These are competing, potentially decisive reasons to silence fascists, but they outweigh the reason to listen to the fascist—they do not dissolve that reason.

That is, however, only if the fascist speaks in a way that is sincere and in good faith and that recognizably appeals to considerations of justice. If fascism itself simply cannot appeal to any such conception, because it is in its nature an unjust ideology, then there is no reason on our view to listen to the fascist. If there is no such reason, our view does not oppose silencing fascists. The possibility or lack thereof of just fascism is beyond the scope of this essay, even if, sadly, it presently merits at least as much attention as the norms surrounding verbal acts of dissent.